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No. 98-487

In The

Supreme Court of the United States

OCTOBER TERM, 1998

MARITIME OVERSEAS CORPORATION,

Petitioner,

v.

RICHARD ELLIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

REPLY BRIEF

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REPLY BRIEF

Petitioner, Maritime Overseas Corporation ("Maritime"), files this reply to the brief in opposition filed by respondent Richard Ellis ("Ellis").

This federal Jones Act case was tried – because respondent chose the forum – in state court. Nonetheless, the petition for writ of certiorari raises issues that arise squarely from federal statutory authority and the interpretation, or misinterpretation, of that authority. *See* 46 U.S.C. App. § 688(a); 45 U.S.C. § 51 ("FELA"). These issues neither concern nor depend on the particular facts of this case, nor are they derived from matters of state law.

I. REPLY CONCERNING JONES ACT CAUSATION.

A. The causation at issue is simply that which requires respondent to prove his damages.

This case appeals yet another judgment that misconstrues the Jones Act and the "featherweight" burden of proof.[1] The misuse of the term "featherweight" and its companion "slight negligence" have resulted in a body of maritime law so inhospitable to defendants that respondent expresses indignation at petitioner's assertion that he bears the burden of proving his damages – despite the fact that this element has been a fundamental requirement of negligence actions for centuries.[2] Respondent nonetheless argues that this requirement constitutes an impermissible encroachment on the latitude granted seamen under the Jones Act. Brief in Opp. 9-12. This is simply not the case. While it is true that Jones Act claimants receive a protection

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[1] *See* Section I.C, *infra*.

[2] The Jones Act provides for damages in negligence when personal injuries are incurred by a seaman "in the course of his employment." *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (emphasis supplied).

from the law enjoyed by few others,[3] petitioner's argument concerning the dual causation burden is simply another way to state that respondent must prove each element of his case, and the featherweight burden applies to only one of those elements, that of liability. Respondent, through semantical sleight of hand, continues to mischaracterize petitioner's position as advocating the wholesale annihilation of the featherweight burden. This straw argument would be impossible if judicial misinterpretation had not collapsed all Jones Act personal injury analysis into a single "featherweight" inquiry that is almost always resolved in the claimant's favor.

Petitioner, however, seeks a review only of those legal issues set out in its petition, none of which requires a radical departure from existing law, but simply a return to its statutory origins.

B. Petitioner has challenged causation consistently.

Respondent asserts that Maritime "has not challenged the jury's causation finding." Brief in Opp. 1. This argument is belied by even the most casual reference to the record, *see, e.g.*, App. K,[4] and was disposed of effectively by Justice Hecht in his dissent to the majority

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[3] The Jones Act's playing field is so pitched that Chief Judge Duffy of the Seventh Circuit stated that appellate opinions of his era had almost convinced him that:

> in any case where a trial judge submits a case to the jury under [FELA], and the jury returns a verdict for the plaintiff, the defendant may as well pay up, irrespective of the question of negligence and causation.

Milom v. New York Cent. R. Co., 248 F.2d 52 (7th Cir. 1957) (Duffy, C.J., concurring), *cert. denied*, 355 U.S. 953 (1958) .

[4] References to "App. ____" are references to the appendices to Petitioner's petition for writ of certiorari [hereinafter Cert. Pet.]. Appendix K includes excerpts from petitioner's briefing below, including excerpts from its motion for new trial.

opinion of the Texas Supreme Court.[5] Moreover, respondent errs by suggesting that causation was submitted to the jury only as part of Question No. 1, the "liability" question. *See* Brief in Opp. 1. In fact, the issue of causation was submitted to the jury twice in this Jones Act case, as it is in every personal injury case: once in the liability question, Question No. 1, and once in the damages question, Question No. 6. (Tr. 16).[6]

In Question No. 1, the jury considered only the issue of petitioner's "negligence," or liability, as evidenced by the question's mention of "injury" and "illness" solely in the abstract and without further specificity or instruction. Consequently, the jury's affirmative answer to Question No. 1 is virtually meaningless without its answer to Question No. 6, the damages question, which asked the jury what sum of money it would find, *"from a preponderance of the evidence,"* would compensate respondent for the injuries or illness he sustained *"as a result of the occurrence in question,"* thus encapsulating the second causation burden in this Jones Act case and illustrating petitioner's argument on this issue. (Tr. 16).

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[5] Cert. Pet. n.19; App. A-22-23 (Hecht, J. dissenting) (emphasis supplied).

[6] *See* Cert. Pet. 12-13. If answered affirmatively, the first question resolves the issue of the defendant's liability, as was the case with the jury's answer to Question No. 1. After that issue is resolved, however, the question of the plaintiff's entitlement to damages, if any, remains unanswered and unquantified.

Respondent alleges that petitioner first made the dual causation argument in the Texas Supreme Court. Brief in Opp. 8 n.1. The many excerpts from petitioner's briefing that are included in Appendix K, dating back to 1991 when it filed its motion for new trial, prove to the contrary. At any rate, respondent's claim is irrelevant because it is virtually beyond dispute that proof of damages is an element of any tort claim. *See generally* WILLIAM PROSSER & W.P. KEETON, THE LAW OF TORTS 30 (5th ed. 1984).

Jury Question No. 6 makes it patently obvious that petitioner did not "create" the second causal burden out of whole cloth because "it never challenged the jury's causation finding." *See* Brief in Opp. 7. The burden of proving causation on the issues of both liability and damages is not petitioner's "creation" in any respect. It is a well-settled, virtually universal aspect of tort law, including maritime personal injury law.[7]

Second, the dual burden is not, as respondent suggests, limited to the default judgment setting. Every plaintiff must prove the causal nexus between the event sued upon and the plaintiff's injuries, which is strictly referable to the damages portion of plaintiff's cause of action. *See Wilkerson v. Teledyne Movible Offshore, Inc.*, 496 F. Supp. 1277, 1286 (E.D. Tex. 1980) ("Plaintiff has proved damages under the Jones Act . . . ."); 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 157 (2d ed. 1987) (maritime tort claimants must prove essential elements of negligence claim, including duty, breach, proximate cause, and damages). Respondent's argument on this point is directly contraverted in *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984), the leading Texas case on this point. In its discussion of the personal injury plaintiff's dual causation burden, the court makes no distinction whatsoever between a default judgment plaintiff and a plaintiff who must prove her case at trial.[8]

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[7] The plaintiff's burden to prove damages is such a longstanding feature of tort law that it is rarely questioned. *See, e.g., Coney v. Union Pac. R.R.*, 136 F.2d 1195, 1197 (8th Cir. 1998) ("Damages constitute an essential element of a negligence claim."); 1B BENEDICT ON ADMIRALTY, § 32, at 3-276 (7th ed. 1983) (setting out elements of recoverable damages in maritime personal injury case). In almost every case, the burden of proving the existence and amount of damages is on the plaintiff, and the failure to prove damages is fatal to recovery. *See Coney*, 136 F.2d at 1197.

[8] *Compugraphic*, 675 S.W.2d. at 731 (emphasis supplied) ("*[A]t trial*, the plaintiff must establish two causal nexuses in order to be entitled to recovery: (a) a causal nexus between the defendant's conduct and the event sued upon; and (b) a causal nexus between the event sued upon and the plaintiff 's injuries).

Finally, and most important, the fact that respondent is a Jones Act plaintiff in no way relieves him from proving the causal nexus between his exposure to diazinon and his alleged injuries.[9] The plain language of FELA sanctions a reduced burden of proof only on the issue of liability. *See* Cert. Pet. 11-14. These principles are applicable in both federal and state courts as substantive federal law. *Garrett v. Moore-McCormack,* 317 U.S. 239, 243-45 (1942). In addition, FELA's text best exemplifies why the principles of proof enunciated in *Compugraphic* are nonetheless applicable in this Jones Act case. FELA clearly approves recovery *solely* for those injuries that are caused by the employer's negligence, *see* Cert. Pet. 11-14, and common-law principles not expressly rejected by the statute are entitled to "great weight" in interpreting the Act. *See Metro-North Commuter R.R. Co. v. Buckley,* 117 S. Ct. 2113, 2117 (1997); *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 544 (1994).

In summary, considering the fact that proof of damages has been an "essential part of the plaintiff's case" since "the action of negligence developed . . . out of the old form of action on the case," WILLIAM L. PROSSER, THE LAW OF TORTS 143-44 (4th ed. 1971), and further considering the myriad FELA and Jones Act cases in which courts have scrutinized the causal link between the event sued upon and the plaintiff's alleged injuries, *see* Cert. Pet. 15-16, respondent's arguments on this point fail.

C. The second causal nexus has no effect on the Jones Act's "featherweight" burden of proof.

Holding respondent to the requirement that he prove his damages does not require this Court to abolish the featherweight burden, rewrite the statute, or make broad "policy considerations" that are appropriately for Congress. *See* Brief in Opp. 12. Recently, for example, in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc), the Fifth Circuit, finally eschewing "blind adherence to

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[9] *See* Cert. Pet. 7-8; 14-20.

an incorrect statement of the law" and taking great pains to re-anchor its decision to the text of the statute, abandoned all of the cases that had misinterpreted the Jones Act as imposing a less stringent duty of "slight care" on a seaman for his safety, as well as those cases that had held employers to a higher than ordinary standard of care. 107 F.3d at 339. Contrary to respondent's assertion that the lower courts are managing the Jones Act "quite well," *see* Brief in Opp. 8, the *Gautreaux* court catalogued and found it necessary to overrule *ten* decisions in that circuit alone, each of which had misinterpreted the statute and *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957). *Id.* at 334-339 (citing cases and overruling "*Spinks* and its progeny" and "*Allen* and its progeny"). These decisions, like that of the Texas Supreme Court, had strayed from the text of the statute, contributing to the "web of more than three hundred years of maritime common law, overlaid with periodic and reactionary statutory developments, and resulting in a clutter of definitions, actions, and remedies that often have no real mooring in practical maritime activity."[10]

D. Respondent has not received a review of the evidence under the standard it requests in this Court.

Respondent errs when he argues that (1) petitioner has received the review it requests from this Court; and (2) a remand from this Court would "send the case to the court of appeals." *See* Brief in Opp. 12. First, apart from the majority opinion, the best evidence of the fact that petitioner has not received the review it requests comes directly from Justice Baker, its author. In summarizing this case, Justice Baker stated:

> The Court noted that under the Jones Act, the causation burden is a "featherweight" standard . . . . Thus, the standard of appellate review in a Jones Act case is less stringent than under common law negligence. Once the court of appeals finds some evidence to support the verdict, the appellate review is complete. The [Texas] Supreme Court

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[10] F. Nash Bilisoly, *The Relationship of Status and Damages in Maritime Personal Injury Cases*, 72 TUL. L. REV. 493, 494 (1997).

> concluded that the court of appeals followed this standard of review when analyzing Maritime's claims. . . .

Justice James Baker et al., *Supreme Court Update, in* STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE PRACTICE COURSE 29 (Sept. 24-25, 1998).

Like the opinion below, this passage clearly indicates that the Texas Supreme Court undertook a single causal inquiry on review, which was entirely eclipsed by the featherweight burden of proof. This lesser standard, of course, should have been confined to the issue of respondent's liability. Nonetheless, the court accepted respondent's argument that the featherweight burden dictates every aspect of a Jones Act case, both at trial and on appeal, including the standard of review. If this Court provides guidance to the Texas Supreme Court on that standard, the case will be remanded to that court so that it may review the en banc court of appeals decision accordingly.

In summary, the benefits of the featherweight burden of proof—judicially created to relieve Jones Act claimants from proving liability by the traditional standard—are not lost if the claimant, once liability is established, must prove his damages by a preponderance of the credible evidence. Neither the Jones Act nor FELA "make[s] the [employer] the insurer for all employee injuries," and "the sky is simply not the limit for jury verdicts." *Buckley*, 117 S. Ct. at 2117 (quoting *Gottshall*, 512 U.S. at 543); *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 141 (5th Cir. 1986) (finding jury award for seaman-decedent's pain and suffering excessive and remanding for new trial).

II. Petitioner has challenged the reliability of respondent's expert scientific evidence consistently.

A. Petitioner challenged the sufficiency of the expert testimony in keeping with the forum's procedural rules.

Respondent continues to argue that the entire legal universe of

scientific reliability begins and ends with the issue of admissibility. This is not always the case, as this Court has acknowledged, in that there are clear circumstances in which scientific expert testimony is "shaky," yet admissible. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 506 (1993). Then, inexplicably, respondent catalogues the testimony of his experts at trial, perhaps in an effort to convince the Court that this case is about the facts, rather than the law.[11] *See* Brief in Opp. 3-5. Like this Court, the Texas procedural rules envision something other than a rigid rule of wholesale exclusion. *See* Cert. Pet. 26 n.21.[12]

The most telling aspect of respondent's argument about petitioner's alleged failure to preserve error on the scientific reliability issue is that respondent was utterly silent on the subject for more than three years after the trial of this case, and his silence continued from the date petitioner filed its motion for new trial on May 29, 1991, through July 29, 1994, when the en banc Fourteenth Court of Appeals issued its opinion. Respondent cannot cite a *single* instance where he argued or even suggested that petitioner had failed to preserve error—not in response to petitioner's post-trial motions, not in his own appellate briefs, and not in the two oral arguments before the court of appeals—and neither the three-justice panel of the Fourteenth Court of Appeals nor the en banc court considered error preservation an issue. Finally, after the case had been on appeal for three years, respondent broached the topic in a brief to the Texas Supreme Court.

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[11] As to the suspect basis for the conclusions of respondents' experts, *see* App. F-41 (Robertson, J., dissenting).

[12] The factual sufficiency of any evidence, including expert scientific evidence, may be challenged for the first time post-verdict in a motion for new trial, *see* TEX. R. CIV. P. 324(b), which was filed by petitioner in May 1991 and included a challenge to the reliability of the damages evidence. This case was particularly well-suited to a post-trial challenge for two reasons: (1) respondent had suffered *some* injury from the acute exposure and was entitled to adduce testimony to that effect; and (2) in a factual sufficiency challenge, one does not know if the plaintiff, at the end of the day, will have carried his burden of proof.

B. The Texas Supreme Court's holding on this issue does not comprise an "independent and adequate state ground."

Respondent's argument on this subject simply has no bearing on the first question presented in the certiorari petition, which is based on the Jones Act. The second question in the petition concerns *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),[13] and respondent's argument is no more effective at precluding review of this question.

Respondent argues that petitioner invoked state law when it asked the Texas Supreme Court to review this case in keeping with *Daubert*, and two Texas cases.[14] For the reasons set out in the petition, however, the state ground to which respondent refers is not independent of the federal question presented because Texas has adopted the federal rule at issue and the federal interpretations of that rule. *See* Cert. Pet. 24 n.19 (Texas evidentiary rule, except for a comma, is mirror of federal rule); *see also Michigan v. Long*, 463 U.S. 1032 (1983); *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956). The Texas Supreme Court's understanding of federal law, including *Daubert* and the federal evidentiary rules it relies upon, so heavily influenced the decision that the court below failed to follow its own pre-existing doctrine on point.

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[13] *Daubert* issues are already before the Court in *Kumho Tire Co. v. Carmichael* (No. 97-1709) which is scheduled for oral argument on December 7, 1998. In *Carmichael*, this Court may well offer further guidance on *Daubert* that would assist the Texas Supreme Court in resolving these issues. At the very least, therefore, the Court should hold this case pending a decision in *Carmichael*.

[14] In the first, *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court adopted *Daubert* and much of the federal jurisprudence applying it, and in the second, *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1993), *cert. denied*, 118 S. Ct. 1799 (1998), the Texas Supreme Court extended its reliance on *Daubert*. Respondent also has the temerity to say that petitioner should have made a "*Daubert* objection" at trial, although this case was tried in 1991, two years before *Daubert* was decided.

In short, the state ground for the judgment of the Texas Supreme Court on the second question is not independent and cannot preclude this Court's jurisdiction. This Court should explain the proper application of *Daubert* so that the Texas courts can fairly decide this case without being constrained by a misinterpretation of federal law.

Conclusion

Petitioner requests that the writ be granted.

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